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Section 240, Judicial Code as amended 6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No.--------

TRUST COMPANY OF GEORGIA,
AS SUCCESSOR TRUSTEE UNDER DEED OF JULIAN E. HOWELL,
Petitioner,

v.

MARION H. ALLEN,
COLLECTOR OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND SUPPORTING BRIEF.

To The Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Trust Company of Georgia, as successor Trustee under deed of Julian E. Howell, prays that a writ of certiorari issue to review a final judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered on the 21st day of November, 1947. A certified transcript of the record in the case, including the proceeding in the Circuit Court of Appeals, accompanies this petition, in accordance with the rules of this Court.

Opinions Below

The opinion of the Circuit Court of Appeals, appearing in the Record at pages 108-115, is as yet unreported. The findings of fact and conclusions of law of the trial court, appearing in the Record at pages 85-99, are unreported.

Question Presented

Whether in calculating the amount of federal estate taxes, petitioner was entitled to an adjustment under Section 302 (d) of the Revenue Act of 1926 as amended (now I.R.C. Sec. 811 (d)) where a transfer in trust was subject to a power of revocation at age 40 (decedent being 29 at death) provided decedent at the time of revocation conveyed one-third of the corpus to or for the benefit of his divorced wife or child, the latter being likewise entitled to one-third of the income during decedent's life.

Statute and Regulations Involved

The pertinent statutes and Treasury Regulations are set out in the Appendix, infra pp. 19-24.

Statement

This question arose in an action instituted by petitioner in the United States District Court for the Middle District of Georgia, against Marion H. Allen, Collector of Internal Revenue at Atlanta, Georgia, seeking to recover federal estate taxes paid on the estate of Julian E. Howell, deceased, in the amount of $107,257.06, with interest from July 2, 1942. Judgment was entered for petitioner in the amount of $3,049.96, with interest. Petitioner appealed, excepting to the decision of the trial court in so far as it denied petitioner the right to recover the full amount sought. The decision of the trial court was affirmed by the Circuit Court.

On February 14, 1930, Julian E. Howell (the decedent), being at the time 22 years old, executed a trust deed conveying certain assets acquired by inheritance (R. 18). This trust instrument provided that out of the income, the trustee should pay to decedent for life whatever sum the trustee determined to be necessary for decedent's support and maintenance. At decedent's death, the remainder was to go to decedent's wife and children, if any, but if none, to his father and brothers for life, and upon their death, to decedent's nieces and nephews. The trust deed contained the following provision:

> "Said first party hereby expressly reserves the right to revoke this trust estate upon arrival of said first party at the age of 40 years. . . ." (R. 20).

Under date of March 20, 1936, Julian E. Howell, decedent, entered into an alimony agreement with Dorothy M. Howell, his wife, to which Clark Howell, Sr., as trustee under the trust instrument of February 14, 1930, assented (R. 62). The essential provisions were as follows:

> (a) Julian Howell assigned to his wife during her life and as long as she did not remarry, one-third of the net income from the 1930 trust. Upon her death or remarriage, this one-third was to be used for the benefit of his son, Julian Howell, Jr.
>
> (b) Julian Howell renounced his right to revoke the 1930 trust upon reaching the age of 40 except upon one condition, to-wit, that at the time of revocation, he convey to Dorothy Howell, if she be then in life and not remarried, one-third of the corpus of the trust estate; or, if she be dead or remarried, that he convey to or for the benefit of Julian Howell, Jr., one-third of such corpus.

(c) All provisions in the contract concerning Julian Howell, Jr., were to terminate upon his reaching 21 years of age.

This agreement provided that the trust indenture of February 14, 1930, should be amended to the extent necessary to charge any trustee thereof with the duty of carrying out the provisions of the agreement with reference to decedent's wife and child (R. 65).

The agreement was incorporated in a divorce decree entered between decedent and his wife in the Circuit Court of the Eleventh Judicial District in and for Dade County, Florida (R. 60, 62).

Decedent died April 19, 1937, leaving a Will. His minor son, Julian E. Howell, Jr., on decedent's death, became the only person entitled to any interest under the trust created February 14, 1930.

The decedent was born August 4, 1908, and reached the age of 21 on August 4, 1929. His son, Julian E. Howell, Jr., was born August 3, 1932, and if he survives, he will reach the age of 21 on August 3, 1953. Dorothy M. Howell, decedent's wife, was born August 31, 1903. According to Carlisle and Actuaries' Mortality Tables (published in Georgia Code Annotated, Tables and Miscellaneous Volume, pages 458 and 459) her life expectancy at the date of decedent's death April 19, 1937, was between 32 and 33 years (R. 38).

During the 12 months following decedent's death, there was a decline in valuation of the assets of the trust estate in the approximate amount of $112,280.63 (R. 38), but petitioner did not seek the benefit of the optional valuation date

afforded by Section 302 (j) (as added by Section 202 (2) of the Revenue Act of 1935) because petitioner was of the opinion that no part of the assets conveyed in trust in 1930 should be included as a part of the estate for federal estate tax purposes.

The trial court found that the transfer in trust was intended to take effect in possession or enjoyment at or after the death of the grantor, and hence fell within the terms of Section 302 (c) and that petitioner was therefore not entitled to the benefit of any adjustment provided by Section 302 (d). The decision of the trial court was affirmed by the Circuit Court.

In the trial court and in the circuit court, petitioner urged that no part of the trust assets were includable in decedent's gross estate; that even if includable, petitioner was entitled to an adjustment under Section 302 (d) (2); and that petitioner was entitled to the benefit of the optional valuation date; but petitioner is seeking a writ of certiorari only on the question of its right to an adjustment under Section 302 (d).

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on November 21, 1947 (R. 116). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Reasons for Allowing Writ

1. The construction given to Sections 302 (c) and 302 (d) by the court below is incorrect and denies to petitioner a substantial right provided by statute.

The court below holds that the transfer in question comes under the classification of Section 302 (c) and consequently Section 302 (d) need not be considered. The effect of this decision is to deny to petitioner the right to an adjustment provided in Section 302 (d).

In the estate tax law, Congress has exercised its right of classification. In Section 302 (c) it dealt with transfers in contemplation of, or taking effect at death. In Section 302 (d) it dealt with revocable transfers. By reason of judicial construction that Section 302 (d) as originally enacted applied only to transfers where revocation could be immediately effective, Congress added subsection (2) to Section 302 (d) to include revocable transfers, no matter when the revocation might be effected or effective. In doing so, Congress provided that proper adjustment should be made representing the interest which would have been excluded from the power if the decedent had lived.

It may well be that transfers subject to revocation but not immediately effective can also be brought under Section 302 (c). This is the contention of the Treasury Department and it was upheld by the court below in this case. If so, the addition of subsection (2) to Section 302 (d) was unnecessary, as such transfers would be includable in any event under Section 302 (c). The fact remains, notwithstanding, Congress did enact the amendment and did provide for a proper adjustment as to all transfers falling within the classification. Neither the Treasury Department nor the courts are authorized to ignore the amendment, or in cases where a transfer may fall within the terms of both Sections 302 (c) and 302 (d), to prevent a taxpayer from obtaining the benefit of the adjustment provided under Section 302 (d) by asserting that includability is based solely on Section 302 (c).

The transfer here involved is taxable by reason of a power of revocation which, though not immediately effective, could have been effective at age 40, subject to certain conditions imposed by the alimony decree. The transfer is clearly within the terms of Section 302 (d) and plainly within the regulation promulgated by the Treasury Department construing Section 302 (d), though the regulation was made subsequent to the death of the decedent.

2. The decision below adds to, rather than clarifies, the existing confusion with reference to what transfers are includable for estate tax purposes and to what extent, and this confusion should be eliminated.

The following questions need to be answered:

Where a transfer can be brought within the terms of both Sections 302 (c) and 302 (d), may the transfer be taxed under Section 302 (c) so as to deprive a taxpayer of a right afforded by Section 302 (d)?

What type of interest would authorize an adjustment? The statute provides an adjustment for "the interest which would have been excluded from the power had the decedent lived." The Treasury Department in this case has contended that the interest must be one which would have continued to exist, regardless of decedent's death. Petitioner contends that so long as the interest would have continued had decedent lived, this is all that is required.

3. The question is of substantial importance, as indicated above. There has been no other decision in which this question was raised and determined, and the question is one which will undoubtedly occur from time to time and should

be finally determined in this case. The amount of taxes involved is substantial, being in excess of the principal amount of $25,000.

WHEREFORE, it is respectfully submitted that a writ of certiorari be issued.

TRUST COMPANY OF GEORGIA, as successor Trustee under deed of Julian E. Howell dated February 14, 1930.

By DAN MACDOUGALD,
ROBERT S. SAMS,
Atlanta, Georgia.

Of Counsel:
MACDOUGALD, TROUTMAN, SAMS & BRANCH
Atlanta, Georgia.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Specification of Errors

The Circuit Court of Appeals erred:

1. In affirming the decision of the trial court.

2. In not holding that the transfer fell within the classification contained in Section 302 (d), and that petitioner was entitled to a proper adjustment representing the interests which would have been excluded from the power if the decedent had lived, the said interests being those provided by the alimony decree.

Argument

The question on which a writ of certiorari is sought has not been determined by this Court. The only appellate court decision in which the question was passed on is that of the court below.

Counsel for the defendant have in the course of this litigation contended that the question was determined by this Court in *Commissioner v. Estate of Lester Field*, 324 U. S. 113 and *Fidelity-Philadelphia Trust Company v. Rothensies*, 324 U. S. 108, but the Court was not dealing in either of those cases with the situation here presented, in that the taxpayer was making no claim to an adjustment under Section 302 (d) (2), and this particular section is not mentioned or considered by the Court in its opinions.

When the Treasury Department first asserted liability in this case, it claimed that the transfer was taxable both under

302 (c) and 302 (d), but later when litigation developed, the Department abandoned the claim that the transfer fell within the terms of Section 302 (d), this being done in order to prevent giving an adjustment as provided under Section 302 (d). The Treasury Department has likewise contended that no adjustment was possible, even if the transfer fell under 302 (d) because there was no "outstanding estate." The trial court agreed with counsel for defendant on both points. The Circuit Court did not consider the second point at all, but agreed with counsel for the defendant on the first point, to-wit, that the trust was taxable under 302 (c) and hence 302 (d) was inapplicable.

Prior to the time when Section 302 (d) (2) was enacted into law, several court decisions held that before Section 302 (d) would be applicable, the power to revoke must be presently exercisable and that the existence of a contingent power was insufficient to cause a transfer to be taxable.

Tait v. Safe Deposit & Trust Company of Baltimore, 74 Fed. (2) 851 (CCA 4).

Day v. Commissioner, 92 Fed. (2) 179 (CCA 3).

To utilize the rule applied in these decisions, a type of trust was devised which contained powers to revoke not presently exercisable, but which could be exercised upon giving notice of a designated length of time or during a certain month of the year. Congress evidently felt that such trusts met the letter of the rule announced, and Section 302 (d) was amended by adding Section (2) as follows:

"Date of Existence of Power.—For the purposes of this subsection the power to alter, amend, or revoke shall be considered to exist on the date of the dece-

dent's death even though the exercise of the power is subject to a precedent giving of notice or even though the alteration, amendment, or revocation takes effect only on the expiration of a stated period after the exercise of the power, whether or not on or before the date of the decedent's death notice has been given or the power has been exercised. In such cases proper adjustment shall be made representing the interests which would have been excluded from the power if the decedent had lived, and for such purpose if the notice has not been given or the power has not been exercised on or before the date of his death, such notice shall be considered to have been given, or the power exercised, on the date of his death."

Congress might have enacted this subsection without making any provision for an adjustment of the interest which would have been excluded from the power had decedent lived, but it did not do so. It specifically provided this adjustment in connection with transfers containing powers to revoke not presently exercisable. Therefore, where an estate must include for federal estate taxation, a transfer falling within the classification of Section 302 (d), then the taxpayer is entitled to the adjustment provided by the statute.

The regulation of the Treasury Department in effect in 1937 was in language similar to the statute (See Appendix, page 20). In 1938, although there had been no change in the language of the statute, the Treasury Department issued new regulations in connection with the Internal Revenue Code. The new regulation, by clear and direct language, includes trusts of the kind here in question within the meaning of the statute. The full regulation is set out in the Appendix, but the pertinent part of Regulation 105, Section

81.20 (b) (3), provides that the power to revoke would be construed as existing on the date of decedent's death

> "if the exercise of the power was restricted to a particular time which had not arrived, or the happening of a particular event which had not occurred, at decedent's death. In determining the value of the gross estate in such cases the full value of the property transferred subject to the power should be discounted for the period required to elapse between the date of decedent's death and the date upon which the alteration, amendment, revocation or determination could take effect."

It is certainly clear that the transfer and trust here in question involves a power to revoke, the exercise of which was restricted to a particular time which had not arrived or the happening of a particular event which had not occurred at decedent's death, to-wit, the arrival of decedent at age 40.

We submit that under the statute the trust here involved clearly falls within the classification of Section 302 (d) and that this construction is that adopted by the Treasury Department in 1938 and continued from that year until the present time without any change.

The other contention advanced by counsel for the defendant before the Circuit Court (but not specifically passed on by the Circuit Court) is that there can be no adjustment unless there is an "outstanding" estate, which as defined by counsel for the defendant is one which is unaffected by decedent's death and one over which decedent had no control at the time of his death, either because it was exempt from the exercise of his power or because his power could not affect it for a certain period of time after his death.

This contention ignores the plain language of the statute.

It does not provide that there shall be an outstanding estate, as defined by counsel for the defendant. It provides that an adjustment shall be made for the "interest which would have been excluded from the power had decedent lived." It is exactly such interest for which petitioner claims it is entitled to an adjustment. Not only does the statute not refer to an outstanding estate, but neither does the regulation (Regulation 105, Section 81.20 (b) (3) or Regulation 80, Article 20 (b) (3)), which provides:

> "When determining the value of the gross estate in such cases, the full value of the property transferred subject to the power should be discounted for the period required to elapse between the date of decedent's death and the date upon which the alteration, amendment, revocation or termination could take effect."

When the statute is applied in this case, it is clear that the interest which would have been excluded from the power had decedent lived, was 1/3 of the income during the life or until the remarriage of the widow and until decedent's son reached 21.

Decedent had no control over this interest of his wife and child at the time of his death. There was nothing he could do to affect this interest. It was exempt from the exercise of his power at that time. So long as the decedent lived, his wife and child would be entitled to their part of the income, unless decedent revoked the trust to be effective at age 40, in which event he was required to make a conveyance of one-third of the trust assets to or for the benefit of his wife and child.

While revocation could not have been effective before age 40 (and then only if decedent lived until 40), there was

nothing to prevent decedent as of the date of his death, exercising this right of revocation, subject, of course, to the provisions of the alimony agreement. Suppose a transfer in trust provided for revocation upon giving notice of one year, two years, five years, or ten years. Would not such transfers fall within the classification of Section 302 (d)?

As already pointed out, the courts have not passed on the question on which a writ of certiorari is sought. Practically no cases have been found which would be of any interest to the Court in considering the question.

An example of a case where an adjustment was made (though not specifically under Section 302 (d)) but where the right to the adjustment was not the question involved in the litigation, is that of

Dominick's Estate v. Commissioner, 152 Fed. (2) 843.

The decedent in 1922 had created a revocable trust which was amended in 1931 to make it irrevocable. The income was applicable to the support of grantor's son until he reached 21, and thereafter was payable to him until 25, at which time he was to receive the corpus. If he did not reach 25, the corpus was to be paid over to the grantor and his wife, or the survivor, or if both were dead, to go as the son should by Will appoint. The grantor died in 1941, survived by his wife and son, then almost 22 years of age. The value of the corpus of the trust estate was $500,394.39. The value of the son's temporary estate, i. e., his right to receive the income until he attained the age of 25, or sooner died, was $54,732.64. Both the Tax Court and the Circuit Court held that all of the corpus should be included in the gross estate *with the exception of the value of the son's temporary estate.*

Clearly, if the estate in that case was entitled to a deduction for the value of the son's temporary estate, petitioner is entitled to a deduction in this case of the value of the interest in favor of decedent's wife and son.

In many cases, adjustments have been made as to the value of outstanding estates or to cover the right of encroachment.

Estate of Lester Hofheimer, 2 T. C. 773.

Commissioner v. Bridgeport Trust Co. 124 F. (2) 48 (CCA 2).

Guggenheim v. Helvering, 117 F. (2) 469, 476 (CCA 2).

The problem presented is merely the application of the statute involved to the particular facts. If the statute provides that the assets in question should be included as a part of decedent's gross estate, then they are to be included. If the statute does not so provide, then such assets are to be excluded and unless the assets are clearly includable under the statute, they should be excluded, because a taxpayer is entitled to the benefit of the doubt in the construction of taxing statutes.

Even if the transfer in trust has properly been held to fall under Section 302 (c), it likewise falls under Section 302 (d) and taxpayer is entitled to the adjustment provided by that Section.

We have not discussed the question of the amount of the adjustment to which petitioner would be entitled under the facts. This question was not considered by either the trial court or the Circuit Court, but if it is ultimately held by this

Court that petitioner is entitled to an adjustment, the amount can be worked out based on the law and the stipulated facts.

If petitioner is specifically given a right under Section 302 (d), it does not matter whether the transfer is taxable under 302 (c). Congress, and not the Treasury Department, imposes taxes and where Congress provides a specific right to a taxpayer falling within a designated case, then such a taxpayer is entitled to that right.

Conclusion

Under both the statute and the regulation construing the same, petitioner is entitled to an adjustment. The decision of the lower court should be reviewed and reversed, and the rights of taxpayers under Section 302 (d) (2) clarified.

It is respectfully submitted, therefore, that the petition for certiorari should be granted.

DAN MACDOUGALD,
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APPENDIX

Applicable Statutes

Sections 302 (c) and 302 (d) of the Revenue Act of 1926 as amended and in effect on the date of the death of Julian E. Howell, April 19, 1937.

SECTION 302.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—

"(c) Transfers in Contemplation of, or Taking Effect at Death.—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years

prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."

(No subsequent changes have been made, and the language set out is identical with Section 811 (c) of the Internal Revenue Code.)

The following language was added to the Section by Joint Resolution of March 3, 1931:

" . . . . including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom; . . . "

(By Regulation, the effect of the Joint Resolution of March 31, 1931 is limited to transfers made after that date.)

(d) *Revocable Transfers—*

" (1) To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona-fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to whom or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death;

"(2) Date of Existence of Power.—For the purposes of this subsection the power to alter, amend, or revoke shall be considered to exist on the date of the decedent's death even though the exercise of the power is subject to a precedent giving of notice or even though the alteration, amendment, or revocation takes effect only on the expiration of a stated period after the exercise of the power, whether or not on or before the date of the decedent's death notice has been given or the power has been exercised. In such cases proper adjustment shall be made representing the interests which would have been excluded from the power if the decedent had lived, and for such purpose if the notice has not been given or the power has not been exercised on or before the date of his death, such notice shall be considered to have been given, or the power exercised, on the date of his death.

"(3) Relinquishment of Power in Contemplation of Death.—The relinquishment of any such power, not admitted or shown to have been in contemplation of the decedent's death, made within two years prior to his death without such a consideration and affecting the interest or interests (whether arising from one or more transfers or the creation of one or more trusts) of any one beneficiary of a value or aggregate value, at the time of such death, in excess of $5,000, then, to the extent of such excess, such relinquishment or relinquishments shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this sub-chapter."

The above is identical with Section 811 (d) of the Internal Revenue Code except that the latter contains another subsection inserted between (1) and (2) and numbered (2) as follows:

"(2) Transfers on or prior to June 22, 1936.—To the

extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death or any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Except in the case of transfers made after June 22, 1936, no interest of the decedent of which he has made a transfer shall be included in the gross estate under paragraph (1) unless it is includable under this paragraph;

Regulations Under Section 302(d)(2) of the Revenue Act of 1926 as Amended and Internal Revenue Code 811(d)(3)

Regulation 80, Article 20(b)(3), insofar as pertinent, provides:

> "The power to alter, amend, revoke, or terminate will be considered to have existed on the date of the decedent's death, though the exercise of the power was subject to a precedent giving of notice, or though the alteration, amendment, revocation, or termination would take effect only on the expiration of a stated period after the exercise of the power, whether or not on or before the date of the decedent's death notice had been given or the power had been exercised, or though the exercise of the power was restricted to a particular time or the happening of a particular event which had not

arrived or occurred at decedent's death. When determining the value of the gross estate in such cases the full value of the property transferred subject to the power should be discounted for the period required to elapse between the date of decedent's death and the date upon which the alteration, amendment, revocation, or termination could take effect. (See article 10 (i) (3).)"

Regulation 105, Section 81.20 (b) (3), provides in part: "The power to alter, amend, revoke, or terminate will be considered to have existed on the date of the decedent's death, though the exercise of the power was subject to a precedent giving of notice, or though the alteration, amendment, revocation, or termination would take effect only on the expiration of a stated period after the exercise of the power, whether or not on or before the date of the decedent's death notice had been given or the power had been exercised, or though the exercise of the power was restricted to a particular time which had not arrived, or the happening of a particular event which had not occurred, at decedent's death. In determining the value of the gross estate in such cases the full value of the property transferred subject to the power should be discounted for the period required to elapse between the date of decedent's death and the date upon which the alteration, amendment, revocation, or termination could take effect."

(Note: Regulation 105 claims to be effective only as to estates of decedents dying after February 10, 1939, the date of the enactment of the Internal Revenue Code. It is of interest, however, as there was no change in the statute as it existed on the date of decedent's death and the date of the promulgation of Regulation 105.